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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY BENTON,

Defendant and Appellant.

B168251

(Los Angeles County  
Super. Ct. No. BA237488)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

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Gary Benton appeals the judgment entered following his conviction by a jury for possession of cocaine base for sale and transportation of a controlled substance. Benton contends the trial court erred by excluding evidence relating to the veracity of the arresting officer and denying his motion to dismiss his prior strike conviction. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The People's Case: Discovery of Cocaine Base in Benton's Car*

Benton was stopped by Los Angeles Police Officers Paul Jordan and Frank Trevino after they heard music blaring from his car's speakers. Benton told the officers he was on parole for a prior burglary conviction. Trevino searched Benton's car and found a plastic bag containing 9.88 grams of cocaine base on the floor near the driver's front seat. Jordan then searched Benton and found \$146 in cash in his wallet and \$20 in each of his socks. No drug paraphernalia was found in the car or on Benton. Based on their training and experience, Trevino and Jordan testified at trial that Benton possessed the large amount of cocaine base recovered from his car for the purpose of sale.

### *2. The Defense Case: Benton Insists the Cocaine Base Was Planted by the Police*

Benton testified he had been sitting in his parked car speaking to a friend when Officers Jordan and Trevino approached and ordered him out of the car. The two officers searched Benton and his car. Neither search produced any drugs. At this point Trevino walked to his patrol car, took something out of the trunk, waved a plastic bag in front of Benton, declared, "Look what I found" and arrested him. Benton also explained he had won the \$186 found in his possession shooting dice earlier that evening.

### *3. Benton's Motion to Introduce Evidence Relating to a Complaint in Officer Trevino's Personnel File Is Denied*

Prior to trial the People provided the defense information from Officer Trevino's personnel file disclosing that he had been suspended from the Los Angeles Police Department for five days in 1995 for making "false and misleading" statements in

connection with his failure to comply with a subpoena.<sup>1</sup> Trevino had told his superiors he could not appear in court because he was sick, but then went out of town. The trial court granted the People's motion to exclude the evidence under Evidence Code section 352, finding the information remote in time, collateral and likely to require a time-consuming minitrial on the circumstances of the suspension.

#### *4. Benton Is Convicted; His Motion for a New Trial Is Denied*

The jury convicted Benton on charges of possession of cocaine base for sale and transportation of a controlled substance. In a bifurcated proceeding Benton admitted he had suffered a prior serious or violent felony conviction (residential burglary) within the meaning of the "Three Strikes" law.

Benton moved for a new trial based on newly discovered evidence, produced by the People after the trial had concluded, that Officers Trevino and Jordan had previously arrested a man named Rodolfo Bautista for selling cocaine, but that those charges were later dismissed for lack of evidence. In her declaration in support of the new trial motion, Benton's counsel asserted that Bautista had told her during an interview that Trevino and Jordan had arrested him even though no drugs were found in a search of Bautista and his car, and the officers knew there was no evidence to support the charges. Bautista also told Benton's counsel that Trevino and Jordan had arrested "the wrong people" on other occasions. Bautista, however, refused to provide a sworn declaration to Benton's counsel to support his accusations against the officers. The trial court denied the motion for a new trial.

#### *5. Benton Is Sentenced as a Second-Strike Offender*

At the sentencing hearing Benton moved to dismiss his prior residential burglary conviction under Penal Code section 1385. The trial court denied the motion and

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<sup>1</sup> The information was produced by the People without a defense motion for discovery pursuant to Evidence Code sections 1043 and 1045 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

sentenced Benton for possession of cocaine base for sale to an aggregate prison term of eight years (the middle term of four years, doubled under the Three Strikes law). The sentence on the transportation count was stayed under Penal Code section 654.

### **CONTENTIONS**

Benton contends the trial court erred by excluding evidence relating to Officer Trevino's suspension from his employment in 1995, denying the new trial motion and refusing to dismiss his prior strike conviction.

### **DISCUSSION**

#### *1. The Trial Court Did Not Err in Excluding Evidence of Officer Trevino's 1995 Suspension*

The trial court in its discretion "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review the trial court's decision to exclude evidence under Evidence Code section 352 for abuse of discretion. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437.) Reversal is warranted only when the "[trial] court [has] exercised its discretion in an arbitrary, capricious or patently absurd manner that result[s] in a manifest miscarriage of justice." (*Id.* at pp. 437-438.)

Benton contends the trial court erred in excluding evidence that Officer Trevino lied about being sick in 1995 to avoid complying with a subpoena because that evidence undermined Trevino's credibility and was therefore highly material to Benton's theory that Trevino had manufactured the evidence against him. In excluding evidence of the suspension, the trial court explained it would have admitted evidence of Trevino's dishonesty had it involved false testimony in a police report or court proceeding or false statements regarding the recovery of drugs or other evidence. However, characterizing the suspension as a "personnel incident," the trial court determined the event was both remote in time (having occurred eight years earlier) and likely to result in a time-

consuming minitrial as to whether illness was the true reason for Trevino's noncompliance with the subpoena.

While acknowledging the exclusion of evidence under section 352 is highly discretionary, Benton relies on *People v. Filson* (1994) 22 Cal.App.4th 1841, 1849, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452, to argue the trial court effectively abandoned its discretion when it excluded the evidence without reviewing the transcript of the suspension proceedings.<sup>2</sup> In *Filson* the defendant maintained an audio tape of a police interview conducted after his arrest would show he had been too intoxicated to have formed the specific intent necessary to commit the charged crime. The People moved to exclude the evidence on the ground that the defendant's intoxicated state during the interview was not relevant to whether he was intoxicated hours earlier when the crimes were committed. Without listening to the tape and without knowing what was on it, the trial court excluded the tape under Evidence Code section 352. The Court of Appeal reversed, reasoning that, "without knowing what was on the tape, the trial court could not make an intelligent evaluation of any probative value of the tape, could not assess any prejudice it might pose, and therefore could not undertake the weighing of these factors required for an informed exercise of the discretion granted by section 352." (*Filson*, at p. 1850.)

Here, unlike in *Filson*, the trial court (as well as the defense) was well aware of the circumstances surrounding Officer Trevino's suspension and knew from the People's proffer they would call witnesses supporting Trevino's claim he had actually been sick on the day he was ordered to be in court. The transcript of the suspension proceedings would have done very little to assist the court's weighing of the factors under Evidence Code section 352. Aware of the pertinent facts, the court determined the 1995 suspension, while perhaps relevant to Trevino's credibility, nonetheless was too remote

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<sup>2</sup> The transcript of the suspension proceedings was apparently available but not produced by the People.

and would be too time consuming to justify admission. That determination was well within the trial court's discretion. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296 [Evid. Code, § 352 "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues"].)

In any event, it is not reasonably probable the admission of evidence that Officer Trevino had lied to his superior officers eight years earlier about being sick would have resulted in a more favorable verdict for Benton. Accordingly, any error in excluding the evidence was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

## *2. The Trial Court Did Not Err in Denying the New Trial Motion*

A trial court may order a new trial when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at trial." (Pen. Code, § 1181, subd. 8.) To warrant a new trial, the evidence must be newly discovered, not merely cumulative, unable to have been produced with reasonable diligence at trial and of such a nature as to render a different result probable on retrial of the case. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The trial court is not required to assume that the newly discovered evidence is true, but rather "may consider the credibility as well as materiality of the evidence in its determination whether introduction of the evidence in a new trial would render a different result reasonably probable." (*Id.* at p. 329.) The decision whether to grant or deny a new trial "rests so completely within [the trial court's] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252, quoting *Delgado*, at p. 328.)

Benton contends the trial court erred in denying the new trial motion based on newly discovered evidence the People had voluntarily dismissed a case against Rodolfo Bautista, arrested by Officers Trevino and Jordan on another occasion and charged with selling drugs. The newly discovered evidence indicated Trevino and Jordan had arrested Bautista after observing him selling drugs to Arturo Galicia; the People later dismissed

the case when Galicia claimed another man, not Bautista, sold him the drugs. As the trial court explained, the evidence implied only that Trevino and Jordan, observing the drug transaction from a distance, were mistaken as to the seller's identity. Significantly, there was no suggestion that either officer supplied the drugs in Bautista's case or otherwise falsified evidence to implicate Bautista. Further, Bautista was later arrested by other officers for selling drugs at the same location, seriously undermining his credibility.<sup>3</sup> Under the circumstances, the trial court's denial of the new trial motion was well within its discretion.

3. *The Trial Court Did Not Err in Refusing to Dismiss Benton's Prior Strike Conviction for Residential Burglary under Penal Code Section 1385*

A trial court may exercise its discretion to strike a prior conviction in furtherance of justice. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 151-152.) “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . the [trial] court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams*, at p. 161; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) We review the trial court's refusal to strike a prior conviction under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375; *People v. Garcia* (1999) 20 Cal.4th 490, 503.)

The trial court carefully considered Benton's motion to dismiss the prior strike conviction and declined to do so because it was a recent offense and Benton had still

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<sup>3</sup> The new charge against Bautista was pending at the time of Benton's new trial motion.

been on parole when he committed the crimes in this case. The court concluded that, under all the circumstances, including the large amount of cocaine base recovered, Benton did not fall outside the spirit of the Three Strikes law. That determination was well within the trial court's discretion.

**DISPOSITION**

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.